IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-882

Frank Hunter, Jr., Petitioner

vs.

State of North Carolina, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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The petitioner, Frank Hunter, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Suprrme Court of North Carolina entered in this proceeding on 13 October 1971.

Opinions Below

The opinion of the Supreme Court of North Carolina appears at 279 NC 498. The opinion of the North Carolina Court of Appeals appears at 11 N.C. App. 573. Both opinions are set out in the appendix hereto.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on 13 October 1971. Motions, based upon the failure of the Court to notify appellant's counsel of the hearing which resulted in the judgment, to void opinion and to allow oral argument and to stay certification were denied on 20 October 1971. This petition for certiorari was filed within ninety days of the date of the opinion of 13 October 1971. This Court's jurisdiction is invoked under 28 USC Sec. 1257 (3).

Questions Presented

(1) Whether there is adequate showing of free, understanding, and voluntary entry of plea of guilty to felony by a record that shows on its face that: (a) although information was read to defendant, no determination was made by trial court of defendant's literacy or ability to comprehend charge or plea; (b) defendant was advised by the trial court that he was charged with secret assault, a twenty year felony, and entered plea to felonious assault, a ten year felony; (c) at the taking of plea, the question, "Has anyone violated any

of your constitutional rights?", was stricken from the transcript of plea, went unanswered, and bore the initials of the trial judge beside the stricking line.

(2) Whether there was a denial of due process in the failure of the Supreme Court of North Carolina to notify defendant's counsel of the hearing on appeal and to allow him oral argument.

Constitutional Provisions Involved

Constitution of the United States, Amendment Fourteen, section one:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.".

Statutory Provisions Involved

Rule Seven of Practice in the Supreme Court of North Carolina:

"During the Spring Term of the Supreme Court hearings will be held on the second Tuesday of the months of February, March, April and May; and during the Fall Term, hearings will be held on the second Tuesday of the months of September, October, November and December. Hearings will begin on these dates and will continue from day to day until appeals in all calendared cases have been heard.".

The cited rule may be found set forth at 4A General Statutes of North Carolina 189.

Rule Thirty of Practice in the Supreme Court of North Carolina:

"(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument...".

The above set forth portions of the cited rule may be found set forth at 4A General Statutes of North Carolina 227.

Statement of the Case

Petitioner came to trial on indictment that charged secret assault. He plead "not guilty" and during the course of the trial, an information charging a lessor felony assault was read to him. The charge in the information carried a maximum punishement of ten years less than secret assault. A plea of "guilty" was entered to the charge in the information and an active prison sentence was entered on the plea. Petitioner signed a "transcript of plea" which contained various questions as to the validity of the plea. In the transcript of plea, petitioner was advised (in question three) that he was charged with secret assault. This was the charge in the indictment. In question six of the transcript, petitioner plead guilty to the lessor felony charge contained in the information. Question twelve, "Has anyone violated any of your constitutional rights?", is stricken from the transcript, left unanswered, and the stricking line bears the initials of the trial judge.

Mr. Hunter's present counsel, upon his entry into the case following the trial, raised constitutional question as to the validity of the plea, which question was raised by assignment of error in the record and by presentation of argument and questions in his brief and personal appearance before the North Carolina Court of Appeals. Petitioner essentially contended that his plea of "guilty" was not freely, understandingly, and voluntarily given according to the federal guidelines set forth in Boykin v. Alabama, 395 U.S. 238, 23 L. Ed2. 274, 89 S. Ct. 1709 (1969). The North Carolina Court of Appeals rejected petitioner's position in its opinion at 11 N.C. App. 573, 181 S.E. 2 752 (1971), the matter was appealed to the Supreme Court of North Carolina on the same basic question and the latter Court sustained the position of the lower state courts in its opinion at 279 N.C. 498, ___ SE 2d _____ (1971). The state Supreme Court noted at page

499 of the official reports that, "...The pertinent portion of the "transcript of plea" and the Court's "adjudication" are fully set forth in the opinion of the Court of Appeals..". It is the respectfully taken position of the petitioner that the matters upon which he relies were not set forth.

Prior to the hearing of the case in the Supreme Court of North Carolina, a calendar of cases to be heard was mailed to and received by the undersigned counsel. The present case was not on the calendar, which was for 14 and 15 September 1971. Counsel did not appear and the case was heard during the period covered by the calendar. Petitioner's first notice of the hearing of the case was when his counsel was advised in the middle part of October that the case had been decided against petitioner by the Court. Upon receiving notice of the decision, petitioner's counsel filed motions in the Supreme Court of North Carolina praying stay of certification of opinion, voiding of opinion and permission to make oral argument. These motions were dated 15 October 1971 and were denied by the Court in conference on 20 October 1971.

Reasons for Granting the Writ

(1) The record in the trial court shows that the plea in question was not freely, understandingly, and voluntarily given in accord with the due process requirements of the Fourteenth Amendment of the Constitution of the United States. This Court, in Brady vs. United States, 397 US 742, 25 LEd2 747, 90 S.Ct 1463 (1970), noted that Boykin required that the record must affirmatively (emphasis added) show that a valid guilty plea was entered voluntarily and with understanding. The present record does not meet such requirements. A presumption of illiteracy was raised by the reading to defendant of the information. Nowhere in the record is there a contest of such presumption. The record shows two concurrently existing felony assault charges, one by indictment and one by information. The transcript of plea shows on its face that defendant was advised that he was charged with one and that he plead to the other. The question in the transcript as to whether or not anyone had violated defendant's constitutional rights was not only unanswered, but stricken out with the initials of the trial judge appearing by the stricking line. Such matters, taken together, do not demonstrate understanding or voluntariness or freedom in the entry of plea.

(2) Petitioner was denied his due process right to notice of the hearing in the Supreme Court of North Carolina and right to present oral argument in the Court. Rule Seven of the Rules of Practice in the Supreme Court of North Carolina provides only for the hearing of calendared (emphasis added) cases. The case at hand was not calendared. Sections One and Two of Rule Thirty of the Rules of Practice in the Supreme Court of North Carolina provide that counsel for an appellant is entitled to open and close the oral argument and that he is entitled to thirty minutes for oral argument. The The notice provided by the sending of printed calendars under and with the provisions of the Rules of Practice in the Supreme Court of North Carolina is a jurisdictional requirement and failure to comply therewith cannot be excused on the ground that such notice is a mere formality. Please see 5 Am Jur 2 Appeal and Error, Sec. 680 at page 127 and Union Trust Company v. National Coal Company, 65 RI 255, 14 A2 506. The right to counsel includes the right to have counsel present at the hearing as provided by the rules of the particular court and to have the counsel permitted to make oral argument in accord with the established rules of the court.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of North Carolina.

Respectfully Submitted,

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Appendix

(1) Opinion in the Supreme Court of North Carolina:

State of North Carolina vs. Frank Hunter, Jr.

APPEAL by defendant, Frank Hunter, Jr., from decision of the North Carolina Court of Appeals (11 N.C. App. 573, 181 S.E. 2d 752) finding no error in the trial before Copeland, S.J., at the 4 January 1971 Criminal Session of IREDELL Superior Court.

Defendant was brought to trial in Iredell Superior Court on an indictment charging secret assault. He had previously appealed from the District Court to Iredell Superior Court convictions of driving under the influence of intoxicating liquor and resisting arrest. The misdemeanor charges, which grew out of the same occurrence, were consolidated with the felony charge for trial. Defendant entered pleas of not guilty to all charges. During the trial a bill of information was read to defendant charging him with felonious assault with a deadly weapon with intent to kill, inflicting serious injuries not resultingin death; whereupon defendant and his attorney in open court and in writing waived the finding and re-

turning of a bill of indictment by the Grand Jury of Iredell County against defendant Frank Hunter, Jr., charging the offense of assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death. Defendant then tendered a plea of guilty to the charge of assault with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death and pleas of guilty to the two misdemeanor charges. Before pleading, defendant signed a transcript of plea, and the trial judge, prior to approving the plea, entered an adjudication in which he adjudges that defendant freely, understandingly and voluntarily made the pleas. The pertinent portion of the "transcript of plea" and the Court's "adjudication" are fully set forth in the opinion of the Court of Appeals. Defendant appealed to the North Carolina Court of Appeals from sentence imposed upon his pleas. The Court of Appeals found no error in the proceedings in the trial court and defendant appealed to this Court pursuant to GS 7A-30 (1).

Attorney General Morgan and Staff Attorney Eatman for the State

Thomas K. Spence for defendant

BRANCH, Justice.

The crux of defendant's as-

signments of error before the Court of Appeals and this Court is that his pleas of guilty were not freely, understandingly and voluntarily made. He relies principally upon the case of Boykin v. Alabama, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S Ct. 1709, which, inter alia, holds that the determination of the voluntariness of a guilty plea cannot be based on a silent record and that the record must show a careful canvassing of the matter with the accused by the trial judge "to make sure he has a full understanding of what the plea connotes and of its consequences.". The Court of Appeals recognized the authoritative holding of Boykin but held that it did not apply to the facts of this case. We agree. Here it appears that the Judge made careful inquiry of the accused as to the voluntariness of his pleas, and the record reveals ample evidence to support the trial judge's finding that defendant freely, understandingly and voluntarily pleaded guilty to the charges. The acceptance of the pleas tendered by defendant should not be distrubed. State vs. Jones, 278 N.C. 259, 179 S.E. 2d 433; Brady v. United States, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463.

The decision of the Court of Appeals is

Affirmed.

(2) Opinion in the North Carolina Court of Appeals:

State of North Carolina vs. Frank Hunter, Jr.

APPEAL by defendant from Copeland, Judge, 4 January 1971 Session, Superior Court of IREDELL County.

The defendant was brought before the 4 January 1971 Session of the Iredell County Superior Court on an indictment charging secret assault. He had earlier been found guilty in district court of driving under the influence and resisting arrest. Defendant's appeal from these two convictions in district court were consolidated with the indictment for secret assault because the charges all arose out of the same incident when defendant allegedly assaulted a North Carolina State Highway Patrolman with a shotgun when the officer had stopped the defendant on suspicion of driving under the influence. Defendant pleaded not guilty to all three charges. During the course of the trial, a bill of information was read to the defendant, charging him with assault with a deadly weapon with intent to kill. Defendant then pleaded guilty to this charge and the two misdemeanors. Defendant formally waived an indictment

on the charge of assault with a deadly weapon with intent to kill. Both defendant and his attorneys signed the waiver. The record contains a "Transcript of Plea," signed by the defendant, wherein he indicates that, among other things: he understands what he is charged with; the charge has been explained to him and he is ready for trial; he understands that he has the right to plead not guilty and be tried by a jury; he pleads guilty to all three charges; he has had time to subpoena any witnesses wanted by him; he could be imprisoned for as much as 12 years and 6 months; he is satisfied with his lawyer and he has had time to confer with him; no one has made any promises or threats to get him to plead guilty; he, freely, understandingly, and voluntarily authorized his lawyer to enter a plea of guilty in his behalf; he had no further statements to make; and that everything that he said said (sic) in this regard was true and correct.. The record also contains by addendum sought by the Attorney General, an "Adjudication" wherein the court found as follows (quoted except where summarized as indicated):

" The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, Frank Hunter, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. (Adjudicating that defendant, represented by privately employed counsel, entered a plea of guilty, and in open court under oath informed the Court as follows):

1. He is and has been fully advised of his rights and the charges against him;
2. He is and has been fully advised of the maximum punishemnt for said offense(s) charged, and for the offense(s) to which he pleads (guilty) (nolo contendere);
3. He is guilty of the offense(s) to which he pleads guilty;
4. He authorizes his attorney to enter a plea of (guilty) (nolo contendere) to said charge(s);
5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;
6. He is ready for trial;
7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of (guilty) (nolo contendere), by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of (guilty) (nolo contendere) be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.
This 6 day of Jan., 1971.

Attorney General Morgan by Staff Attorney Eatman and Staff Attorney Mitchell for the State.

Thomas K. Spence for defendant appellant.

MORRIS, Judge.

All of defendant's assignments of error essentially contend that the defendant's plea of guilty was not freely, understandingly and voluntarily given according

to the federal guidelines set out in Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). In Boykin, the Supreme Court set out three consittutional rights which were forfeited by a plea of guilty: the right not to incriminate one's self; the right to trial by jury; and the right to confront one's accuser. The Court then said: "We cannot presume a waiver of these three important federal rights from a silent record." Boykin v. Alabama, supra. This is certainly not the case here. The record is far from silent on this point. Defendant signed a transcript of plea in which he shows that he freely, understandingly and voluntarily pleaded guilty to the offenses with which he was charged. As to defendant's contention that it was error for the court to accept defendant's plea of guilty when defendant never admitted that he was in fact guilty, see North Carolina v. Alford, 400 U.S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), where the Supreme Court said:

"Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal pe

nalty.' An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

We have carefully examined all of defendant's assignments of error and find them to be without merit.

In the proceedings in the trial court we find

No error.

Judges BROCK and HEDRICK concur.